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CONTENTS

Volume XXXII, Number 1, January, 1955

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DRAFTING PARTNERSHIP AGREEMENTS—THE GENERAL LAWYER'S RESPONSIBILITY FOR INCOME TAX CONSEQUENCES UNDER THE INTERNAL REVENUE CODE OF 1954*

By ARTHUR B. WILLIS, *of the California Bar*

In light of the income tax provisions of the Internal Revenue Code of 1954 applicable to partners and partnerships, no general lawyer can fairly and properly disclaim responsibility for income tax consequences of partnership agreements that he drafts. The 1954 Code places great emphasis upon the terms of the partnership agreement, and important tax consequences flow from the inclusion or omission of certain matters. On six occasions, the 1954 Code refers to the "partnership agreement" as determining the tax treatment of partnership transactions. The lawyer who drafts a partnership agreement must assume responsibility for tax consequences that are dependent upon that agreement.

CONTRIBUTION OF PROPERTY TO PARTNERSHIP CAPITAL.

Take the case of Mr. Jones. He goes to Mr. Barrister, his general attorney, and tells him that he is about to invest $10,000 cash in a partnership business with Mr. Smith. Mr. Smith will contribute certain real property to the partnership at an agreed valuation of $10,000. The partnership profits are to be shared equally. Mr. Barrister prepares a "routine" short and simple partnership agreement. One month after the partnership is formed, the partners decide to move the business to another location. They find a purchaser who buys the real property for $10,000 cash.

Shortly thereafter, the partnership's taxable year is closed and a partnership return is prepared. Mr. Jones is startled when he discovers that the partnership return shows a gain of $9,000 from sale of the real property and one-half of that amount, or $4,500, is reflected as being taxable to him. He insists that this cannot be right. He points out that had there been no partnership transactions other than the sale of the real property, the partnership assets following the sale would consist of $20,000 cash, of which he would be entitled to $10,000, the amount he originally invested in the partnership. Mr. Barrister agrees with the logic of Mr. Jones' contention, but decides to investigate further.

It develops that Mr. Smith had paid only $1,000 for the real

* The Committee on Taxation of Partnerships, Section of Taxation, American Bar Association, is attempting to inform the general attorney of the great importance placed on the drafting of partnership agreements under the Internal Revenue Code of 1954. This will be accomplished through a series of articles written by individual Committee members for publication in Bar Journals and Law Reviews throughout the 48 states. The present article is one of that series and is reprinted from the American Bar Association Journal of November, 1954.

property. It had appreciated in value by $9,000, so that the fair market value was $10,000 at the time it was contributed to the partnership. Belatedly, Mr. Barrister studies the partnership provisions of the 1954 Code. He discovers that under section 723, the partnership's basis for computing depreciation or gain or loss on sale of the contributed property is the cost (with certain adjustments) of that property to the contributor. Therefore, even though the real property came into the partnership at an agreed valuation of $10,000, the partnership's basis for income tax purposes was only $1,000. When the partnership subsequently sold the property for $10,000, it realized a taxable gain of $9,000.

Section 704(c)(1) of the 1954 Code provides that the taxable gain or loss on sale of property contributed by a partner shall be allocated among the partners in accordance with the partnership agreement. In this instance the partnership agreement provided that all profits or losses were to be divided equally between Mr. Jones and Mr. Smith. Mr. Barrister is forced to the conclusion that Mr. Jones must pay an income tax on his distributive share ($4,500) of the partnership taxable gain, even though he received no economic benefit from the sale of the real property for $10,000.

Mr. Barrister pursues his study of the 1954 Code and discovers that Mr. Jones need not have realized any taxable gain from the sale of the real property contributed by Mr. Smith, *had the partnership agreement contained an appropriate provision.* Section 704(c)(2) provides that the partnership agreement may allocate solely to the contributing partner the tax consequences of the difference between his cost of the property and the value at which it was contributed to the partnership. If the partnership agreement had so provided, upon sale of the property the $9,000 difference between Mr. Smith's $1,000 cost and the $10,000 valuation at which it was contributed to the partnership would have been allocated solely to Mr. Smith. Since the taxable gain was $9,000, the entire amount of that gain would have been taxable to Mr. Smith and Mr. Jones would have had no taxable gain. All this could have been, if the partnership agreement had only so provided.

Mr. Barrister had fumbled the ball. Because he wasn't acquainted with the partnership provisions of the 1954 Code, Mr. Jones will have to pay an unnecessary tax of $1,125 (25% of $4,500). Has Mr. Barrister a moral obligation to reimburse Mr. Jones for the $1,125 needless tax?[1] Sould he shrug it off on the

[1] Actually, Mr. Barrister might have some defense in mitigation of his responsibility. Mr. Jones' basis of his partnership interest is increased in the amount of his distributive share ($4,500) of the partnership gain on the sale of the real property. (Section 705 (a)(1)(A)). Thus, assuming there were no other transactions following the partnership's sale of the real property, Mr. Jones would have a basis of $14,500 for his interest (representing $10,000 for his cash contribution plus $4,500 as his share of the gain on sale of the contributed property). If the partnership were liquidated, Mr. Jones would be entitled to receive only $10,000 cash. He would have a taxable loss of $4,500 on liquidation of the partnership. This loss would offset the "illusory" taxable gain of $4,500 on

basis that he warned Mr. Jones he wasn't a "tax expert"? The very least that Mr. Barrister will lose is Mr. Jones' esteem and that is a very precious asset to a practicing attorney.

PAYMENTS TO A RETIRING PARTNER OR TO A DECEASED PARTNER'S SUCCESSOR IN INTEREST.

Any carefully drafted partnership agreement will contain some provision for payments to a retiring partner or to the executor or heirs of a deceased partner. In the past it has been extremely difficult to determine which part of the payments is the purchase price for the capital investment of the retiring or deceased partner and which part is a distribution of a continuing interest in partnership profits. The 1954 Code makes it clear that control of the tax incidents of such payments lies in the terms of the partnership agreement.

Under section 736(b), payments made to liquidate the capital interest of a retiring or deceased partner are considered as being the purchase price of his interest. Such payments do not reduce the amount of partnership profits taxable to the continuing partners. As to the retiring or deceased partner, gain or loss is recognized only to the extent that the money paid to him exceeds the basis of his partnership interest.[2]

Frequently the partners agree that payments should be made to a retiring or deceased partner in excess of the amount required to liquidate his capital interest in the partnership. Such payments may be for his interest in the good will or going concern value of the partnership. Often such payments are in the nature of mutual insurance for the benefit of a deceased partner. It is with respect to this class of payments that the partnership agreement determines the tax consequences.

If the partnership agreement provides that these extra payments are for the retiring or deceased partner's interest in good will, they are treated as part of the amount paid in liquidation of his interest in the partnership. As previously noted, this requires the continuing partners to report as taxable income the full amount

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which Mr. Jones paid tax when the partnership sold the property. The drawback is that the partnership may not be liquidated for several years. Mr. Jones may refuse to be consoled about the tax that he is "out of pocket", in the hope of a tax benefit at some future date when the partnership is liquidated.

An alternative might be to ask Mr. Smith to reimburse Mr. Jones for the $1,125 tax. After all, Mr. Jones is paying tax on a gain that was shifted to him from Mr. Smith. If the partnership agreement had made provision for distributing the taxable gain all to Mr. Smith, he would have paid tax on a $9,000 gain. Since half of that taxable gain is shifted to Mr. Jones, it can be argued that it is only fair that Mr. Jones be reimbursed by Mr. Smith for the tax on the shifted gain. It's an apealing argument, but Mr. Smith is liable to "opine" that he is a law-abiding citizen, and if the law says Mr. Jones should pay a tax on $4,500 of the partnership gain, all good citizens should accept that result.

[2] Section 731 of the 1954 Code. Special rules are applicable if the partnership had unrealized receivables or substantially appreciated inventory. See section 751 of the 1954 Code.

of the partnership's income, without reduction for the payments to the retiring or deceased partner.

On the other hand, the payments to the retiring or deceased partner may be made to constitute taxable income to him, thus reducing the amount of partnership income taxable to the other partners. If this is the desire of the partners, all that is required is to omit any specification that the payments are for an interest in partnership good will.

This means that control of this significant income tax matter is vested in the partners and in the skill and knowledge of the draftsman. If the continuing partners are in a relatively high income tax bracket they will want as much as possible of the payments to a retiring or deceased partner to be treated as his distributive share of partnership income. Any payments thus treated will be fully taxable to the retiring or deceased partner, and to that extent, the taxable income of the remaining partners will be decreased. Conversely, it would be to the selfish interest of the retiring or deceased partner to have these payments constitute purchase price of his interest rather than distributions of partnership income.

The important point is this: Once it is realized that control of the taxability of the payments to the retiring or deceased partner lies in the provisions of the partnership agreement, an arrangement can usually be worked out to the mutual satisfaction of all partners. For example, it is likely that the continuing partners would be willing to pay a considerably greater amount over a number of years to the retiring or deceased partner, if such amounts were considered as distributions of partnership income, thus reducing their own taxable income. The retiring partner, or the successor in interest of the deceased partner may be in a much lower income tax bracket than the continuing partners, so that the taxability of the distributions may not be as much of a detriment to him as it is an advantage to the continuing partners. Having this range within which to bargain, an intelligent approach in the partnership agreement will make it possible to work out a plan of payment which will balance the income tax factors to the mutual advantages of the continuing partners and the retiring or deceased partner.

REVISING PREVIOUSLY EXECUTED PARTNERSHIP AGREEMENTS.

There are varying effective dates for the different provisions dealing with taxation of partnerships. (Section 771). The provision dealing with distributive shares of taxable gain or loss on sale of property contributed by a partner is effective only for a partnership taxable year beginning after December 31, 1954. However, if property contributed prior to that date is sold after the effective date, the new provision will apply.

In the example discussed at the first section of this article, the partnership may have been formed several years ago. However, if

the property contributed by Mr. Smith is sold after the effective date, and if the partnership agreement does not specifically cover the point, Mr. Jones will be taxable on a $4,500 gain when the partnership sells the property.

Thus, the lawyer has a responsibility for the application of the 1954 code to partnership agreements drafted in the past as well as for those he will draft in the future. He should ascertain the extent to which previously prepared partnership agreements will be affected by the 1954 code and advise his clients of desirable changes. Where property was contributed by a partner and is still owned by the partnership, it may be desirable to have an amendment to the agreement specifically dealing with the allocation of taxable gain upon the sale of that property.

Also, the attorney has the responsibility to call to the attention of existing partnership clients, the changes in the income tax law with respect to payments to a retiring or deceased partner. It is just as important to amend existing partnership agreements to obtain maximum tax advantages from such payments as it is to properly draft a new one.

DISTRIBUTION OF PROPERTY IN LIQUIDATION OF A PARTNER'S INTERESTS.

A partnership transaction which has commonly been thought to involve no tax implications is the distribution of a partnership property in the retirement of the interest of a partner, or a distribution in complete liquidation of the partnership. There has been a tendency to regard the whole problem as one of determining values of the various properties to be distributed, so that each partner receives a distribution proportionate to his interest in the partnership.

Under the 1954 Code, there are definite tax implications in the distribution of property in the liquidation of a partner's interest. This is particularly true if the partnership has unrealized receivables or inventory with a value substantially in excess of cost. (Section 751). In such a situation a distribution of property to a retiring partner, other than a distribution of his pro rata interest in all partnership assets, is considered as a sale by the continuing partners of their interests in the distributed property in exchange for the interest of the retiring partner in the remaining partnership properties.

Take the case of White, Black and Brown engaged in the ranching business. The partnership assets consist of the following:

	Basis	*Value*
Cash	$15,000	$15,000
Ranch	6,000	9,000
Cattle	—o—	12,000
Total	$21,000	$36,000

Each of the partners has a basis of $7,000 for his partnership interest. White wishes to retire from the partnership. It is agreed that White will take the cattle which are valued at $12,000 in satisfaction of his partnership interest. In this situation, Black and Brown will be considered to have sold to White for $8,000 their two-thirds interest in the cattle inventory and they will have a total ordinary income of $8,000 from the transaction. White, the retiring partner, will be considered to have sold his one-third interest in the ranch and he will have a $1,000 taxable gain on that transaction. Thus, all of the partners will realize taxable gain on the distribution of the cattle in retirement of White's interest in the partnership.

Perhaps the distribution of the cattle to White is the only practical way to retire his interest. However, if the attorney were acquainted with the partnership provisions of the 1954 Code, it might be possible to work out a distribution to White which would not result in taxable income to all the partners. At least, the partners are entitled to be forewarned of the tax consequences of the proposed distribution to White.

* * * *

This article is not intended to be a comprehensive coverage of the income tax provisions applicable to partnerships in the 1954 Code. Other sources must be consulted for such edification. The sole purpose here is to call to the attention of the general attorney the fact that under the 1954 Code he is necessarily burdened with some responsibility for the tax consequences of the instruments to partnerships which he drafts.

The partnership provisions of the 1954 Code are moderately complicated. However, they contain no mysteries that cannot be mastered with a reasonable amount of study. The Internal Revenue Code of 1954 offers a challenge to the general lawyer. If he accepts that challenge fairly and fully, he can continue drafting partnership aggreements with full confidence in his coverage of the income tax problems. If he fails the challenge and prepares partnership agreements on the principle that he is not responsible for income tax consequences, he will do his clients, himself and his profession a great disservice.

BARRY v. NEWTON — PERPETUITIES — CONTINGENT REMAINDERS — "IF AT ALL"*

By THOMPSON G. MARSH†

The deed said, "In the event that the wall . . . shall at any time be rebuilt, . . . thereupon title to the rear . . . strip hereinabove reserved shall immediately and without further conveyance . . . pass to the then owner of Lot eleven . . ."[1]

The court said, "The claimed interest is an executory interest . . ."[2] and held it void for remoteness.

So far, so good; but the court after having decided that the interest was executory, went on to say, by way of dictum, "The rule against perpetuities is applicable to contingent remainders . . . The usual effect of the rule against perpetuities is to prohibit or invalidate attempts to create by limitation, whether executory or by way of remainder, future interests or estates, the vesting of which is postponed beyond the prescribed period."[3]

This is a very clear statement of a proposition that is, as a matter of fact, not so clearly established.

Kales says, "The Rule against Perpetuities did not commence its development until 1680, when the *Duke of Norfolk's* case was decided . . . The common law contingent remainder, which was subject to the common law rule of destructibility, had existed for over two centuries before the *Duke of Norfolk's* case. There is some opinion to the effect that the Rule against Perpetuities never applied to such remainders. The moment, however, that the rule of destructibility is partially abrogated, as it was by the Contingent Remainders Act of 1845, the contingent remainder ceases to be the common law interest which it was before, because it may, under such act, take effect as a springing executory interest after the termination of the proceding estate of free-hold. Under these circumstances the Rule against Perpetuities is appropriately applied to it. The recent English cases, which appear to hold that contingent remainders are subject to the Rule against Perpetuities (citing *In re Frost* [4] and *In re Ashforth's Trusts* [5]) were decided with reference to contingent remainders to which the English Contingent Remainders Act of 1845, at least, applied. They do not, therefore, sustain the proposition that the Rule against Perpetuities would apply to the common law contingent remainder which continued to be fully subject to the rule of destructibility."[6]

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* 273 P. 2d 375, 1953-1954 C.B.A. Adv. Sh. 18.

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[1] Barry v. Newton, *supra*, p. 738.

[2] *Id.*, p. 740.

[3] *Id.*, p. 740.

[4] 43 Ch. Div. 246.

[5] 21 T.L.R. 329 (1905).

[6] Kales, Estates, Future Interests and Illegal Conditions in Illinois (1920), No. 662.

Gray says, "Whether contingent remainders are subject to the Rule against Perpetuities has been much discussed. As the Rule governs all shifting and springing uses and executory devises, and all contingent limitations of personal property, whether in the form of remainders or not, it seems very desirable that contingent remainders should be subject to the Rule also. Some reasons have, however, been suggested for exempting legal contingent remainders from the operation of the Rule against Perpetuities . . . [Then, after seventeen pages of discussion] . . . It has now been determined that the Rule does apply to them. *Re Frost. Re Ashforth. Whitby v. Von Luedecke.*"[7] It is to be noticed that the first two of these cases are those which Kales has cited and has distinguished as dealing with remainders to which the English Contingent Remainders Act of 1845 applied. The same is true of *Whitby v. Von Luedecke,*[8] which dealt with interests created in 1877.

Simes says, "It has sometimes been argued that the rule should not be applied to legal contingent remainders in land . . . [after two pages of discussion] . . . In England the question has become one of purely academic interest by the passage of the Law of Property Act of 1925 . . . but prior to that time such authority as existed tended in that direction [i.e., toward the applicability of the Rule]. In the United States, while the courts do not discuss the point, cases may be found where contingent remainders have been held void under the rule, and such is doubtless the law."[9] Here Simes cites seven cases, each of which will be briefly commented upon.

1. *Owsley v. Harrison.*[10] The will of Carter H. Harrison provided that the residue of his estate be kept together for two years after his death, and then, "After the expiration of said period of two years, all of my estate . . . not disposed of as hereinabove directed, shall be divided into four equal . . . shares . . .: One of such shares I bequeath to each of my four children who may at the time be alive. If either of my four children shall prior to that time have died . . . etc . . ." It is plain, because of the two year gap between the death of the testator and the creation of the interests which the court held to be void for remoteness, that all those interests were executory, and were not remainders of any sort because there was no prior estate of freehold to support them.

2. *Ryan v. Beshk.*[11] Edward J. Ryan devised land to Delia for the term of her natural life, and "Upon the death . . . of . . . Delia, I hereby give to . . . James . . . Michael . . . Margaret . . . and Helen . . ., if they be living at the death of [Delia], or in the event of the death of all or any of said persons mentioned I give . . . his or her . . . share intended for him or her who has died

[7] Gray, The Rule Against Perpetuities, 4th Ed. (1942), pp. 316-333.
[8] (1906) 1 Ch. 783.
[9] Simes, The Law of Future Interests (1936), No. 505.
[10] 60 N.E. 89, 190 Ill. 235 (1901).
[11] 170 N.E. 699, 339 Ill. 45 (1930).

before the death . . . of . . . Delia, to his or her executor or administrator to be applied by such as if the same had formed part of the estate of such person . . . at his or her decease . . ." The decision, holding the gifts to the personal representatives to be void for remoteness has been criticized by Gray as "an obvious slip in an otherwise excellent opinion. All the shares vested at the termination of the life estate. The vesting of the interests of the legatees or next of kin of a deceased remainderman did not depend on the existence of an executor of administrator."

Even if it be conceded, in accordance with the court's inaccurate assumption, that a gift to a personal representative is not deemed to have vested at the death of the decedent but only upon appointment of the personal representative, the case still is not authority for the point for which it has been cited because it falls squarely within the rule of *Doe d. Evers v. Challis*,[12] namely, that "where a devise over contains two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may . . . be divided though included in one expression . . ." in the case of *Ryan v. Beshk* the gift to the personal representatives of the named persons who might die before Delia does contain two such contingencies: One, that the personal representative be appointed during the continuation of Delia's life estate, in which event the gift to the personal representative would be valid as a common law remainder and would vest before the termination of the life estate; the other contingency is that the personal representative not be appointed during the continuation of Delia's life estate, in which event the gift to the personal representative necessarily would be executory because of the gap between the termination of the life estate and the appointment of the personal representative. In other words, this was a case in which orthodox rules called for separability by construction, and in which, as a consequence of such separation, the only remote gift if any, would have been executory.

3. *Graham v. Whitridge*.[13] The will of George Brown set up a trust and provided, "In case . . . Grace . . . shall not leave living at her death, . . . any descendant . . . then . . . the said Trustees . . . shall continue to hold . . . to and for such of my other descendants . . . in such proportions, and for . . . such . . . Estates . . . as . . . said . . . Grace . . . may . . . appoint . . ." The court says, "The question which this state of facts presents, and which we are therefore called on to decide, is this, namely: Is the will of [Grace] a valid execution of the power of appointment contained in the will of . . . George Brown? . . . Are the limitations . . . as made in . . . [Grace's] will void for remoteness under the rule against perpetuities?" Obviously the court was dealing only with interests created by the exercise of a power of appointment,

[12] 18 Q.B. 231, 7 H.L. Cas. 531 (1850, 1859).
[13] 57 A. 609, 99 Md. 248, 66 L.R.A. 408 (1904).

and such interests are always executory according to the orthodox theory of powers.

4. *Lockridge v. Mace.*[14] Thomas J. Lockridge devised land "unto my children now born, and which may hereafter be born, and to the issue of their bodies, as a life-estate only, to said two generations, . . . and upon the death of my grandchildren the title in fee-simple . . . is to vest absolutely in my great grandchildren . . ."

The court held that "The remainder in fee to the grandchildren . . . [is] . . . void", but it is to be noticed that it based its holding in part upon the Rule in *Whitby v. Mitchell.*[15] "The heart of this cause is involved in this question: Does the third clause violate the rule respecting perpetuities? . . . Touching this point of perpetuities, an eminent authority says: 'Still the policy of the law is against clogging the free alienation of estates, and, as will be shown hereafter, it has become an imperative, unyielding rule of law—First, that no estate can be given to the unborn child of an unborn child . . .' 1 Washb. Real Prop. (5th Ed.) . . . 'Thus if an estate were limited to A for life, remainder to his unborn son for life, remainder to the sons of his unborn son, the limitation would be too remote, so far as the grandchildren were concerned, and therefore void.' 2 Washb. Real Prop. p. 760. Charles R. Lockridge at the death of his father, the testator, was seven and one-half years old. The will gave him one-fourth interest in the land for life; the remainder to his unborn children for life; remainder in fee to his unborn grandchildren, i.e., unborn children of unborn children . . ."

5. *Wood v. Griffin.*[16] Simes himself notes this case as, "dictum".

6. *In re Kountz' Estate.*[17] "The question in this case is whether the trust created by the will of testatrix violates the rule against perpetuities . . . By her will . . . Mrs. Kountz . . . devised and bequeathed her residuary estate as follows: . . . 'After the decease of the last of my immediate children, and the lapse of ten years from the date when my youngest grandchild shall have become of age, the principal of the whole estate shall be equally divided among my grandchildren' . . . Beyond doubt . . . the trust was active . . . there is no direct and explicit gift of the principal; it is only implied from the direction to divide . . ." It is obvious that this case does not involve a legal contingent remainder in land, but an equitable interest in the nature of a contingent remainder in a mixed fund.

7. *Geissler v. Reading Trust Co.*[18] "Bill to annul a testa-

[14] 18 S.W. 1145, 109 Mo. 162 (1891).
[15] 42 Ch. Div. 494, 44 Ch. Div. 85 (1890).
[16] 46 N.H. 230 (1865).
[17] 62 A. 1103, 213 Pa. 390, 3 L.R.A. (N.S.) 639, 5 Ann. Cas. 427 (1906).
[18] 101 A. 797, 257 Pa. 329 (1917).

mentary trust . . . Testator's will provided . . . 'After the death of all my children and their children (my grandchildren), then I direct that the above mentioned investments (real estate and securities) . . . shall be divided among all my great-grandchildren . . . per capita . . .' " Held, that "The plaintiffs are entitled to a decree declaring the aforesaid trust . . . void . . ." Another case in which the interest is not a legal remainder in land, but an equitable interest in the nature of a remainder in a mixed fund.

Thus it appears that all of the seven cases cited by Simes in 1936 are, to say the least, inconclusive. In 1951 he states that "Contingent remainders are subject to the rule."[19] and cites four cases. Three of them, *in re Frost, Graham v. Whitridge,* and *Geissler v. Reading Trust Co., supra,* have already been commented upon.

The fourth is *Abiss v. Burney.*[20] ". . . The first question is whether the rules as to remoteness apply to what has been termed an equitable remainder, where the legal estate has been vested in trustees under the same instrument which creates the equitable estate. The second question is, whether the limitation with which we have to deal in this case is an equitable remainder or an executory devise . . ." In addition to holding that the rules as to remoteness do apply to an equitable remainder, the court says, "Of course, if this is a limitation by way of executory devise it is void for remoteness . . . In my opinion, therefore, the gift . . . is an executory limitation, and subject to all the rules with regard to executory limitations . . ."

Simes' next sentence is as follows, "It has sometimes been said that, if contingent remainders in land are destructible, they are not subject to the rule; but it has been held that the rule applies to them." For this final clause there is cited *In re Ashforth, supra,* which has already been commented upon and distinguished in the above quotation from Kales.

In view of the foregoing considerations, the clear dictum in *Barry v. Newton,* on a point that was not mentioned in the briefs, that "The rule against perpetuities is applicable to contingent remainders," invites scrutiny of the authorities which are cited by the court. There are three cases: *Chilcott v. Hart,*[21] and *Madison v. Larmon,*[22] in both of which the interests were held not to be remote, and *Bankers Trust Co. v. Garver,*[23] in which the court was dealing, not with the rule against perpetuities, but with an Iowa statute which provided that "Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter." Thus it appears that the cases which the court cites as authority for its unqualified dictum that the rule against perpetuities applies to contingent remainders are

[19] Simes, Handbook on the Law of Future Interests (1951), 378.
[20] L.R. 17 Ch. Div. 211 (1881).
[21] 23 Colo. 40, 45 P. 391, 35 L.R.A. 41 (1896).
[22] 170 Ill. 65, 48 N.E. 556 (1897).
[23] 222 Iowa 196, 268 N.W. 568 (1936).

no more conclusive than are those cited by Gray and by Simes. The doubt expressed by Kales remains.

Another misleading statement in the case of *Barry v. Newton* [24] occurs when the court first states, "The rule against perpetuities is applicable to contingent remainders, and the event on the happening of which the remainder is to vest must be one that is certain to happen within the prescribed period, or the limitation will be bad." It is to be noted and regretted that the all important phrase, "IF AT ALL" is omitted from this statement of the rule, an omission which is cured in this case, by the subsequent statement that, "Under this rule no interest subject to condition precedent is good unless the condition must be fulfilled, if at all, within the period limited by the rule."

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V. G. SEAVY, JR., Managing Editor.

[24] *Supra*, p. 740.

EVIDENCE AND CRIMINAL LAW

By WILLIAM E. DOYLE *of the Denver Bar*

EVIDENCE

There have been few decisions dealing with evidence questions during the past year; in fact, there are only four decisions which treat the question of admissibility. There are, of course, problems which are within the limits of the field of evidence which are considered in substantive law fields. For example: There are some criminal law cases which are discussed under that heading which actually deal with the problem of proof or sufficiency. Three of the cases involve hearsay exceptions and the fourth deals with the opinion evidence rule.

Opinion evidence: It is not conclusive so that it establishes the matter in controversy as a matter of law if uncontradicted. *Rosenthal v. Citizens Bank of Cortez.*[1]

This was an action to recover $2,500.00 which plaintiff alleged that he had deposited in the defendant bank. The bank denied the deposit and the evidence at the trial consisted of documents such as deposit slips and pass books, together with the testimony of the interested parties as to the alleged deposit. Plaintiff called a handwriting expert who testified that the notation in the plaintiff's pass book was in the handwriting of the bank teller. There was no expert testimony to the contrary, and consequently plaintiff argued that there was no issue of fact as to this. It was held that the testimony of such an expert is not conclusive even though not contradicted, and that the jury verdict in favor of the defendant bank must stand.

It was also held that a bank deposit slip is not conclusive against the bank as to the fact of deposit—that it is mere evidence that a deposit was made. It is like a receipt and may be explained by extrinsic evidence.

The Supreme Court does not always follow the rule of the *Rosenthal* case, supra. One controversial decision, a Workmen's Compensation case, has held that uncontradicted opinion evidence creates a question of law and not a question of fact; *Arvas v. McNeil Coal Corporation,*[2] held uncontradicted medical opinion evidence to be conclusive. It is submitted that the principal case adopts the proper rule.

Hearsay evidence: In order to establish a case of trespass to land, the plaintiff must establish by competent evidence that there was a trespass on his land and hearsay testimony as to boundaries cannot be used to establish this and is insufficient as a matter of law. *Yakes v. Williams.*[3]

Here verdicts were returned against the defendants for trespassing on the land of the plaintiffs and cutting timber. It appeared

[1] 1953-54 C.B.A. Adv. Sh. No. 8.
[2] 119 Colo. 289, 203 P. 2d 906.
[3] 1953-54 C.B.A. Adv. Sh., No. 14.

that plaintiffs did not have positive evidence as to the boundaries of their tract—that the boundaries to which they testified were established on the basis of hearsay. *Held* that it was error to direct a verdict for the plaintiffs. Judgment reversed with directions to dismiss the complaint.

Certainly a plaintiff cannot recover in trespass to land unless he proves that the defendant actually entered upon his, the plaintiff's land, and unquestionably this must be established by competent evidence. This case should also be examined, however, as a tort decision because it includes some *dicta* which suggests that an unintentional trespass may not be actionable. This is contrary to the orthodox view, although there are some authorities who recommend that the action of trespass to real estate should lie only where the defendant has knowingly or negligently trespassed upon the plaintiff's land.

Res gestae: It was error to admit the testimony of a police officer in a murder prosecution that he had received a complaint from the victim three days prior to the homicide and he had observed bruises on her person. *Brown v. People.*[4]

The issue in this case was whether the homicide was accidental or intentional, there being no question about the defendant's having fired the gun five times. He claimed that he had fired the first bullet accidentally and that his mind had then become a blank. For the purpose of proving motive, the prosecution called a police officer who three days before the alleged murder had received a complaint from the victim, at which time the defendant was identified as her assailant. This action of the court was held to be prejudicial error.

> . . . Any testimony from the police officer detailing what was told to him by deceased would be hearsay evidence. The character of the evidence is not changed from forbidden hearsay to competent evidence by the technique of permitting the offcer to draw his conclusions from all that was said by deceased, and give the result thus obtained in one sentence to the effect that, 'She made the complaint against Mrion Brown, Jr.'

As a matter of fact, if the evidence was to satisfy the requirements of the *res gestae* exception, it would have been much better to have detailed the conversations so as to establish that the event, that is the beating, was in fact speaking. The conclusion of the police officer could hardly be considered to be within the *res gestae* exception.

It was also held to be error to allow the district attorney under the guise of discrediting the defendant as a witness to cross-examine him with respect to a gun incident which occurred in the year

[4] 1953-54 C.B.A. Adv. Sh. No. 17.

1950 with a view to establishing that he had in the past used the gun for some purpose other than to shoot at tin cans and bottles.

The errors were regarded as particularly prejudicial since the death penalty had been imposed by the jury. No one can argue that it is not desirable policy to scrutinize judgments imposing the death penalty with great care.

Judgment based upon hearsay evidence: As it appears here where an essential allegation of claim is established by hearsay evidence, the Court must direct a verdict, notwithstanding that the evidence was received without objection. It was error to deny the motion to strike. *Wheelock Brothers, Inc., a Corporation v. Lindner Packing Co.*[5]

This was an action by a meat packer for damages arising from the defendant's failure to properly refrigerate meats which were shipped to the army quartermaster at Fort Worth, Texas. At the trial it appeared that a portion of the shipment was rejected by the quartermaster and was returned, and sold to the Colorado State Penitentiary at Canon City. Plaintiff recovered in the trial court the amount which was lost on the transaction—the meat was sold to the penitentiary at less than the market price. The only evidence as to the reason for the rejection was that of plaintiff's manager who testified that he was notified by a third person that a part of the shipment was rejected bcause the truck was not properly refrigerated. He further stated that he was informed that the rejected meat was soft. It was held that this evidence was not competent and should not have been considered by the trial judge in passing on the motion for a directed verdict. The Court considered the argument that in a carrier case there is a presumption of negligence where the goods were delivered in good order to the carrier and were in bad condition when delivery was made. It was held that the burden was on the plaintiff to either show that the goods were in bad condition when they arrived at destination or to prove that the carrier was negligent.

Undoubtedly the Court concluded that if negligence was presumed one would be presuming that the goods were damaged from the fact that they were rejected and one would then be presuming negligence from this latter conclusion. It is fundamental that a presumption cannot be based upon a presumption.

CRIMINAL LAW

The only area where there was a great deal of activity was that of extradition of a fugitive under the Uniform Extradition Act. This act was passed in 1951 and it makes very radical changes in the extradition procedure in that it allows interstate rendition of fugitives where the defendant was not within the demanding state at the time of the commission of the offense, if he did an act in another state which resulted in the violation of the laws in the

[5] 1953-54 C.B.A. Adv. Sh. No. 18.

demanding state. Undoubtedly it is because of the radical departure from the orthodox practice of allowing extradition pursuant to the constitution and laws of the United States only where the defendant had actually fled from the demanding state, that caused our court to construe the new statute very strictly.

There are four decisions which deal with this subject and they will be very briefly outlined. The first of these is *McKnight v. Forsyth, Chief of Police.*[6] This involved the right of the demanding state to extradite a defendant for non-support where he was not in the state at the time of the alleged commission of the crime.

The demand here was not made pursuant to the Uniform Extradition Act which allows extradition where the defendant is charged with the commission of an act in this state which intentionally results in a crime in the state whose executive authority is making the demand. The Court rightly held that where an attempt is made to extradite the defendant on the theory that he has fled from justice, it will fail notwithstanding the provisions of the special statute.[7]

Extradition: Habeas corpus is proper remedy where the papers do not show that respondent is a fugitive from justice. *Teeter v. People.*[8]

In order to extradite under the uniform extradition law it is necessary to comply strictly with its provisions. Where extradition was sought pursuant to Section 3 of the act, i. e. that part having to do with fugitives, it is ineffectual and void where it clearly appeared from the evidence that the accused had not been in the demanding state at the time.

Extradition: Where extradition is sought under Section 6 of the Uniform Extradition Act allowing an accused to be extradited notwithstanding that he was not in the demanding state on the date of the alleged commission of the crime there must be a strict compliance with the statute. *Stobie v. Barger.*[9]

Where extradition is sought under Section 6 of the Uniform Extradition Act under which extradition can be had where an act is committed in one state which intentionally results in the crime in another state, the act must be complied with strictly and even where the papers from the demanding state are in order, the accused is entitled to his liberty on a writ of habeas corpus where the warrant of the Governor of Colorado recites that extradition is granted under the Constitution and laws of the United States. The governor's warrant was held to be void.

Extradition: Glover v. Foster.[10]

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[6] 1953-54 C.B.A. Adv. Sh. No. 8.
[7] Wigchert v. Lockhart, 114 Colo. 485, 166 P. 2d 988.
[8] 1953-54 C.B.A. Adv. Sh. No. 10.
[9] 1953-54 C.B.A. Adv. Sh. No. 11.
[10] 1953-54 C.B.A. Adv. Sh. No. 16.

Under the Uniform Extradition Act a hearing before the governor is formal only unless the accused waives extradition, but if he files a petition for writ of habeas corpus, he is entitled to a hearing before the district court and at the time every question is tested. In this case the demand was made upon the basis that the defendant had fled from justice and, consequently, it was competent for him to introduce evidence in court that he was not a fugitive.

Assault with intent to commit rape: Sufficiency of the evidence where resistance on the part of the victim is not affirmatively shown. *Crump v. People.*[11]

The evidence was to the effect that the defendant attacked the victim on the street late at night; that he knocked her down, and was engaged in carrying out his evil purpose when he was thwarted by the lights of an automobile. The Court held that the crime is complete if the defendant commits an assault and his acts are such as to indicate his intention to overcome resistance by force—that express evidence of resistance is not essential. The Court also held that there was no misconduct on the part of the district attorney in commenting on the fact that the defendant's attorney would not allow the arresting officer to testify—presumably because he was not endorsed.

Compounding a felony: Manion v. Stephens.[12]

Here plaintiff in a civil action for conversion had filed a criminal action against the defendant charging the larceny of a quantity of turkeys. Following the arrest of the defendant the parties met in the office of the sheriff and defendant agreed in writing to pay the plaintiff an amount equal to the value of the turkeys which were allegedly converted. Subsequently defendant refused to comply with this undertaking and plaintiff brought an action in conversion. At the trial plaintiff offered and the court received in evidence the signed statement of the defendant in which he agreed to make restitution. Defendant contended on review that this was an illegal agreement in that it amounted to compounding a felony, and that it was therefore error to receive it. It was held, however, that it was not inadmissible on this ground, for in order to constitute this offense there must be a promise not to prosecute with intent to stifle the prosecution of a public offense. It was pointed out that in the instant case there was no promise not to prosecute; that the evidence did not establish that there had been a larceny. The conversion which the jury found was innocent and not intentional and this is sufficient in a civil action.

Circumstantial evidence: Sufficiency to sustain a conviction. *Gonzales v. People.*[13]

The evidence upon which defendant was convicted of possession of narcotics was that marijuana cigarettes were found in the

[11] 1953-54 C.B.A. Adv. Sh. No. 8.
[12] 1953-54 C.B.A. Adv. Sh. No. 1.
[13] 1953-54 C.B.A. Adv. Sh. No. 6.

hotel room which he shared with a woman who was referred to in the opinion as his wife. Few of her belongings were found in the room, and although they were registered there as husband and wife, the relationship had been apparently of short duration. Even though she testified that the drug was her property—that she had purchased the cigarettes for her own use, the Court held that the evidence sufficiently established his possession—that it was not necessary to exclude every possible theory except that of guilt; that it is sufficient to exclude every "reasonable" theory except that of guilt.

Verdict: A general finding of guilt is sufficient in a larceny case even though there is no finding as to value. *Archer v. People.*[14]

The defendant was charged with the theft of one meat cattle of the value of $100.00. The evidence was uncontradicted as to the question of value.

> In a criminal prosecution where the information sets out the value of the property unlawfully obtained or stolen, a general verdict of 'guilty as charged in the information herein' is sufficient to support a sentence for grand larceny where the information alleges that the property stolen was of the value of $100.00 and there is uncontroverted evidence that its value exceeded the amount stated in the information.

Homicide: Jack Kukuljan v. People.[15]

Instruction on involuntary manslaughter is not necessary where as in the instant case, there is not the least scintilla of evidence that the homicide was accidental. Here defendant shot the deceased as he was going down the street in the latter's car. Defendant's wife was in the car, and defendant had discovered her in intimate embrace an hour before, and had then proceeded to obtain his 30:06 rifle. The first shot hit the front tire and the second shot went through the back of the car and the back of deceased's head.

> It needs no citation of authorities to demonstrate that when defendant fired at the automobile with its occupants he was committing an unlawful act. Death resulted 'in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being' and, under the statute, where death thus results, "the offense shall be deemed and adjudged to be murder."

Pleading: People v. Conner Holmes.[16]

Burglary with and without force as duplicity when they are charged in the same information: *Held* that these are not distinct

[14] 1953-54 C.B.A. Adv. Sh. No. 11.
[15] 1953-54 C.B.A. Adv. Sh. No. 10.
[16] 1953-54 C.B.A. Adv. Sh. No. 10.

offenses but two different ways of charging a single offense. There is a single transaction and there can be but a single conviction.

Proof of Corpus Delicti: Use of confession for the purpose of establishing the corpus delicti where it is corroborated by other facts and circumstances. *Martinez v. People.*[17]

The charge was that of burglary and conspiracy to commit burglary. The substantive charge was dismissed by the trial court and a conviction was had on the conspiracy. The evidence adduced at the trial disclosed that the defendants were discovered at the scene engaged in prying bricks out of a wall behind a liquor store. One of the defendants was arrested at the scene, and the other got away. He was arrested the next morning after hiding in a creek all night. He had cut his hand in the process, and his clothes were wet. He confessed to having been present and explained the cut hand and wet clothes. Under the authority of *Williams v. People,*[18] it was held that the evidence was sufficient to support the verdict; that the confession was admissible and that together with the surrounding circumstances established the crime.

Comment on Martinez case. The corpus delicti involves proof that a crime has been committed—that there has been a criminal agency. The agency of the accused is a distinct problem. When the police officers saw one of the defendants prying bricks out of a wall, and the other defendant acting as a lookout he was in a position to testify to facts which provided an ample foundation for the introduction of a confession. Even without the confession, it would seem that the inference that there was a conspiracy afoot to burglarize the liquor store was clear.

Proof: Sufficiency of foundation for introduction of deposition of an absent witness. *Haynes v. People.*[19]

The prosecution was for murder and the defendant was convicted of murder in the second degree. At the trial the deposition of a witness who had since departed was offered and received. The extent of the showing to justify its admission was the testimony of the sheriff that he had been handed a subpoena directed to the witness in question; that he had inquired throughout the country, at the places where he had worked and where he roomed, and was unable to locate him. The Court held that it was error to admit this deposition under these circumstances; that the prosecution had not established the use of due diligence to secure the personal attendance of the witness. The cases involving the taking of depositions in order to allow witnesses to leave the state, which cases sanction the use of depositions, were distinguished.

While depositions are allowable in criminal cases, the circumstances permitting their use must be extra-

[17] 1953-54 C.B.A. Adv. Sh. No. 9.
[18] 114 Colo. 207, 158 P. 2d 447.
[19] 1953-54 C.B.A. Adv. Sh. No. 8.

> ordinary. The necessity must be clearly established, and the duty of showing that necessity is the burden upon the prosecution.

Sentence: Propriety of a penitentiary sentence where a boy under the age of 21 has served a reformatory sentence and is subsequently prosecuted for an offense which occurred prior to the first conviction. *Rivera v. People.*[20]

The Court held that a sentence of twenty-five (25) years in the penitentiary was not valid, and that habeas corpus was the proper remedy to question the validity of this sentence. The reason given by the Court was that at the time of the commission of the offense the defendant had not been convicted of a felony and no subsequent conviction could change this condition. It was said:

> The law applicable at the time of the commission of the offense under all the facts and circumstances thereof must govern and control any prosecution based thereon . . .

Comment: A proper decision. The analogy is the second offense statute or the habitual criminal statute. In this type of case the courts take the same view. The purpose of increasing sentences following repeated violations is to discourage the repeater or recidivist.

Appeal and error: Failure to specify points in the motion for new trial. *Cook v. People.*[21]

It was noted that none of the points presented for review were included in the motion of the defendant for a new trial. In affirming the judgment it was said:

> A careful examination of the entire record convinces us that the verdict finding defendant guilty was amply supported by competent evidence. . . . The purpose of a motion for new trial is to accord the trial judge an opportunity to consider, and correct if necessary, any erroneous rulings made by him, and to acquaint him with the specific objections to those rulings.

Procedure following an insanity plea: Martin v. People.[22]

Action in prohibition to prevent the trial of the defendant upon his not guilty plea where he had simultaneously with the entry of the plea of not guilty also entered a plea of not guilty by reason of insanity. The rule was made absolute, the Court holding that the statute although providing for the trial of

[20] 1953-54 C.B.A. Adv. Sh. No. 7.
[21] 1953-54 C.B.A. Adv. Sh. No. 8.
[22] 1953-54 C.B.A. Adv. Sh. No. 8.

the not guilty plea first did not contemplate trial forthwith and prior to commitment for examination and report. It was said:

> We are of the opinion that the trial court erred in refusing to commit accused for observation and examination as to his mental condition, and we hold that such commitment, under the facts presented, is mandatory and must be had before a trial on any issue can be conducted.

Comment: One interesting feature is the observation of the Court that it has doubts about the validity of the provision which allowed a trial on the merits before that on insanity and without a determination of the insanity issue. On this subject the Court said:

> . . . While we have considerable doubt as to whether an accused person can be compelled by statute to first stand trial upon the issues framed by a plea of not guilty and compel withholding of determination of his mental responsibility until after a verdict has been rendered on the not guilty plea, we are not here called upon to determine. The constitutionality of Section 509, supra, is not raised in this cause and is not here determined.

It is noteworthy that in the case of *Bauman v. The People* [23] (which is not within the scope of this review but belongs to the 1955 review) the problem was again before the Court, and while the dissenting justices, Holland and Bradfield, held that the law was unconstitutional, the majority of the court reversed the judgment of the District Court on the ground that there had been error in the admission of evidence and suggested that on a re-trial the defendant be permitted to enter the additional plea of not guilty, and that he be not held to have admitted his guilt but enter a plea of not guilty by reason of insanity.

> *Sufficiency of evidence:* Testimony of accessory uncorroborated is not necessarily sufficient. The trial judge is justified in directing a verdict where the witness has been discredited. *People v. Phillip Urso.*[24]

The charge was aggravated robbery. One Davidson and Pratt robbed Elderman, and were quickly apprehended. Davidson implicated Urso and later after he was out on bond went to the office of an attorney and signed an affidavit exonerating Urso.

> When we have before us the finding of a competent trial judge who had the opportunity to observe the witness, his demeanor, and consider the possible or likely quality of his testimony on account of his past criminal record, and the fact that he was a participant in the crime, and consider all of the evidence in the entire case and ar-

[23] 1954-55 C.B.A. Adv. Sh. No. 1.
[24] 1953-54 C.B.A. Adv. Sh. No. 12.

> rive at an honest conclusion that the testimony of the only evidence that would implicate defendant was unworthy of belief, then he certainly had the right to say, and it was his duty to say, that it was unbelievable and, in law, was not competent to support a verdict of guilt, then we must uphold the end of such courageous action by affirming his judgment.

The case is noteworthy because it modifies the rule which has obtained in criminal case that the jury is the judge of the credit to be given to a witness and of the weight to be given to his testimony. Heretofore, the rule has been that the testimony of an accomplice must be received with great caution if uncorroborated by other evidence, but that it can result in conviction if it establishes guilt beyond a reasonable doubt even though it is not corroborated.

ADMINISTRATIVE LAW, MUNICIPAL LAW, ZONING

By J. GLENN DONALDSON *of the Denver Bar*

ADMINISTRATIVE LAW

(1) *Colo. Contractors Ass'n., Inc. v. Public Utilities Comm.*, 128 Colo. 333, 262 P. 2d 266.

Action for declaratory judgment that the Commercial Carrier Act and the ton-mile tax imposed thereby are inapplicable to heavy construction contractors, who use their own large trucks for transportation of materials.

The Supreme Court held that they were so exempt—not because included in the exemption clause of the Act, which they were not, but simply because they were not within the intended scope of the Act.

The legislation under examination, The Commercial Carrier Act of 1935, since amended, is the last of the legislative classifications of carriers by motor vehicles. It was previously held in *Commission v. Manley*,[1] that the '35 Act is regulatory in character, not primarily for the raising of revenue, and goes no further than to regulate and license the use of the highways when used to transport freight in furtherance of any commercial enterprise. In short, Justice Clark pointed out here that the Commercial Carrier Act of 1935 under examination, applies to transportation of property sold or to be sold: that a heavy contractor, when purchasing needed materials and supplies, buys not for resale, but to incorporate them in the completion of a new integrated structure wherein they are useless for any other purposes: the procurement and haulage of required materials is but incidental to the over-all task of producing the finished product contemplated under the contract.

[1] 99 Colo. 153, 60 P. 2d 913.

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[1] 99 Colo. 153, 60 P. 2d 913.

Outside authorities were buttressed by Colorado decisions concerned with the sales and use tax law, particularly *Craftsmen, Painters and Decorators v. Carpenter.*[2]

(2) *People ex rel Dunbar, v. County Court of City and County of Denver*, 128 Colo. 374, 262 P. 2d 555.

This was an original proceeding filed by the Attorney General to prohibit the County Court from proceeding in contempt against state officials who had directed that a mentally defective child be refused admission to the State Home and Training School.

The Court held that where there was no available bed space in school, refusal of admission of child was not abuse of discretion. Hence we see that a commitment from the County Court is not always a mandatory order, particularly where directed to an institution concerned with education and training as distinguished from a custodial institution such as the State Hospital for the insane. The Court looked to legislative intent as expressed in the statutes for this distinction.

Probably of greater general interest was the conflict involved between the judicial and executive branches of the government caused by the Court's citation of three institutional officers for contempt in refusing the admission. The Court pointed out that these individuals were not officers of any judicial tribunals nor parties to this nor any other judicial proceedings, hence a state officer, under such circumstances, may not be required to answer in response to a contempt citation.

(3) *Bruce, Secretary of State v. Leo; Bruce, Secretary of State v. Holesworth,* Consolidated .... Colo. .... 267 P. 2d 1014.

Defendants, one a purveyor of liquor by the drink, the other by the package, were charged by information with the unlawful sale of alcoholic liquor to minors. Upon arraignment, both defendants entered separate pleas of *nolo contendere* to the charges and the Court thereupon assessed nominal fines, which were paid.

Based upon the foregoing, the Secretary of State took steps to cancel said licenses based upon the theory that they had been found guilty of a violation of the liquor law in a court of record. In this he was enjoined by the court below.

The Attorney General conceded that upon hearing, the State Licensing Authority could not utilize the plea of *nolo contendere* as evidence of such sales nor as conclusive admissions of their guilt thereof without running counter to *People v. Edison.*[3] He contended, however, that a plea of *nolo contendere,* followed by sentence results in conviction insofar as the application of statutory liabilities are concerned.

The Supreme Court granted that there was much authority elsewhere in support of the Attorney General's position, but pointed out that under its decision in the *Edison Case, supra* it was com-

[2] 111 Colo. 1, 137 P. 2d 414.
[3] 100 Colo. 574, 69 P. 2d 246.

mitted to the proposition that the plea of *nolo contendere,* while effective for sentence in the case where entered, is not otherwise or elsewhere conclusive. In short, anything growing out of such plea, such as a sentence, could not be used as a conviction if the plea itself is deprived of that classification.

(4) *People Ex rel Dunbar, Atty. Gen'l. v. District Court of the City and County of Denver,* .... Colo. .... 268 P. 2d 1098.

This, too, was an original proceeding seeking a writ in the nature of prohibition against the District Court to prohibit further proceedings in a class action instituted by the United Workers for the Blind in Colorado, Inc., and a taxpayer against the State Board for the Blind, its Executive Director, State Controller, State Treasurer, State Auditor and their sureties. The gist of the complaint was that the Board and its Director had negligently conducted the affairs of the Industries for the Blind; had misapplied and falsely reported funds and covered same by bribery of employees of Auditor's Office, etc. Damages in considerable monetary sums were demanded in what the Court termed a "Mother Hubbard Complaint." Injunctive relief was asked.

The Supreme Court held that one who seeks relief from the courts for an alleged breach of duty imposed on public officers by statute, must show that he had exhausted the means available to him through the executive officials of the state. For example, if appropriations are not wisely spent, the General Assembly can remedy the situation as a legislative matter. If the affairs of the Industries for the Blind are negligently conducted by the Board, the Director of Public Institutions and Governor are charged with the duty of remedying the situation. Further, this action was an attempt to control through judicial process, the power and discretion of officers and agents within the Executive Department in violation of Art. XII of the State Constitution.

A minor point made may save some attorney future embarrassment if noted. That is the observation that the plaintiff corporation, United Workers for the Blind in Colorado, Inc., organized in 1917 for the purpose of promoting in every feasible way the industrial, social, educational and economic welfare of the blind and partially blind people in the state, is not a taxpayer, but is a non-profit corporation organized for social and altruistic purposes. As such, the Court stated, it is not qualified in a taxpayer's action such as was here involved.

(5) *Colorado State Board of Nurse Examiners v. Hohu,* .... Colo. ...., 268 P. 2d 401.

This case involves court intervention with arbitrary and unlawful action of an administrative agency.

The registered nurse's license of Miss Hohu had been revoked for little more than the uncorroborated testimony of a doctor that she had referred to a patient as the "..... old fool." The Court observed:

"If it was held to be the rule that profanity is a ground for revoking a license, then here could be a serious depletion in the ranks of all professions."

The Court went on to find that the charges were not supported by the evidence and that one ground of revocation,—that she possessed habits rendering her unsafe or unfit to care for the sick, was not even specified in the charge against her.

One may wonder whether the Court was so incensed over the kangaroo court proceedings before it, that it made some rulings which it may later have to retract.

Both the Court below and the Supreme Court ruled, in effect:

(a) *That the one who hears, must decide.* In other words, in the case at hand, three of five Board members attended the hearing but the remaining two members based their decisions on a later reading of the transcript of the proceedings. This method was scorned as following a "correspondence school pattern" and the proceeding was held to be void and of no effect. The statement "that one who hears must decide" appeared in the first Morgan case, decided in 1936 by the U. S. Supreme Court. While in the same opinion the high court clearly indicated that it didn't mean what it said, the decision was believed by some to sound the death knell for administrative hearings as hearing officers in the first instance were a virtual necessity in the field of federal administrative pratice. The Morgan case, three decisions later, brought the law back to where it had started and today mere review of the records made is sufficient under the Federal Administrative Procedure Act and held to constitute due process by the federal courts. Review of the record made by the deciding authority, however, is not sufficient under Colorado practice.

(b) The Court also ruled:

Under the strict rule concerning certiorari, we are permitted To determine whether or not the Board abused its discretion. How, (the Court asks) can we make such determination without considering the testimony and the facts before the Board, together with the charges made? Unless we are free to make such determinations from the recorded testimony and facts, there would be no occasion for any review of any acts of a Board with statutory powers only.

Does this indicate a policy of free substitution of judgment by the Court? The generally accepted rule is that while the reviewing authority should, of course, carefully inspect administrative agency actions, it should be very cautious in the exercise of this power. It should not disturb the Board's action unless the evidence clearly indicates that the Board has acted arbitrarily, without sufficient evidence or just cause or in bad faith. It should not disturb the action of the Board merely because it thinks the action is not what it would have taken if it had heard the case originally.

(6) *Centennial Turf Club, Inc., v. Colo. Racing Comm.*, ... Colo. ...., 271 P. 2d 1046.

This was a declaratory judgment action brought by horse track licensees.

The Court drew a logical distinction between breaks ("odd pennies on payment to the wagerer up to ten cents") concerning which the statute is silent as to the beneficiary, and the excess of underpayments (to wagerers) and overpayments which expressly accrued to the State.

It held that the licensees, in absence of any express provision to the contrary, were entitled to retain breakage. The rule of law recognized was that: "The state can obtain revenue only by means of taxation and is not allowed to obtain revenue by implication."

(6) *Battaglia, et al v. Moore,* 128 Colo. 326, 261 P. 2d 1017.

Action in the nature of mandamus to compel the Board to issue a barber's license to the plaintiff, Moore.

The Barber's Act in its applicable section requires that an applicant for license shall have "practiced the trade in another state for a period of at least two (2) years and is possessed of requisite skill in said trade . . ."

Plaintiff, for approximately seven years, performed all the services customarily performed by barbers, but the situs of his work was on naval ships and not in "another state". The Board denied the application on the grounds that plaintiff's experience was in the wrong place—that is, not "in a geographical area with a defined civil government".

Both as to the geographical question and that of requisite skill, the Court observed:

> Any legislation purporting to restrict one's right to follow any lawful, useful calling, business or profession will be strictly considered in favor of the existence of the right and against the limitation.

The Court found that the purpose of the requirement was to assure a minimum of two years actual practical experience and that the legislature was not concerned with geographical boundaries. The Court noted that the Board had issue licenses to those whose only experience was acquired in foreign countries and concluded that experience under the American flag on board a warship was at least its equivalent.

The trial court had entered two separate orders prior to entry of judgment to which this writ of error was directed. It was contended that those prior orders were final judgments and upon the entry thereof the court lost jurisdiction to proceed further in the absence of a motion for new trial or other formality within the provisions of the Rules of Civil Procedure. While each of the orders which were entered prior to the judgment here in question, was inconsistent with the judgment finally entered, they contained a specific provision under which the trial court expressly retained jurisdiction for further proceedings.

The Court, relying on *Goodwin v. Eller*,[4] rejected the contention stating:

> The Court having retained jurisdiction had full power to reconsider any findings previously made and to reach different conclusions of fact or law as finally adjudicated.

MUNICIPAL LAW

(1) *Linke v. Board of County Commissioners of Grand County*, ... Colo. ...., 268 P. 2d 416.

In 1946 several school districts created and organized the "Middle Park Union High School District", conducted an election under the statutes and authorized the issuance of $125,000 in bonds to build the school building; $105,000 of these bonds were outstanding at time of suit.

In 1948, two other school districts in the County, by elections, were annexed to the Union High School District. The Board of County Commissioners failed and refused to levy a tax on the property in the newly annexed districts for purposes of paying its proportionate share of principal and interest on the bonds previously issued by the Union High school District.

Plaintiff sought by this action to compel the Board of County Commissioners to so act, that is, to levy a tax on the newly annexed area to assist in paying off the old bonded indebtedness.

The court below sustained defendants motions to dismiss.

The question raised before the Supreme Court was the constitutionality of a status which sought to make newly-annexed districts subject to assessment and levy to pay for such prior issued bonds. Plaintiff contended that the statute was unconstitutional being in violation of Art. XI, Sec. 7 of the Colorado Constitution, which provides in substance that no school district can create a debt for erection of school buildings unless the proposal be submitted to election and approval by majority vote.

This was a case of first impression in Colorado but after extended review of authority the Supreme Court held that there was no constitutional conflict. It pointed out the inequities in permitting the newly annexed districts to enjoy the benefits without contribution, hence it ruled the levy on the newly annexed districts to pay their proportionate share of the previously issued bonds proper and in order.

(2) *Finney et al v. Estes*, ... Colo. ...., 273 P. 2d 638.

This is a garbage case from Colorado Springs. The City Charter provides that no franchise shall be granted by the City except upon the vote of the taxpaying electors: that no exclusive franchise shall ever be granted. It also provides:

> The Council may grant a permit at any time in or upon any street, alley or public place, provided such per-

[4] 127 Colo. 529, 258 P. 2d 493.

mit may be revocable by the Council at any time, whether such right to revoke be expressly reserved in every permit or not.

An initiated ordinance was adopted which caused the City to suspend collection of garbage itself and let the collection out in bids.

Plaintiffs sought, through a declaratory judgment action, to set aside the contract granted upon the grounds that it constituted the granting of a franchise and was in violation of City Charter because no vote of the electorate was obtained.

The high Court held that a franchise is ordinarily accepted as being applicable to the well known services which are deemed public utilities. Garbage collection is non-such—it is simply the carrying out of a governmental function for the preservation of public health and safety.

The grant by City Council of non-exclusive rights to collect and dispose of garbage, revocable at any time without penalty, constitutes a revocable permit and is valid.

(3) *Cook et al v. City and County of Denver,* 128 Colo. 578. 265 P. 2d 700.

This was a suit by property holders for declaratory judgment and for injunction restraining the City and the Housing Authority from building storm sewers as authorized by an ordinance creating the Valverde Storm sewer District in Denver. The decision is one on the pleadings and not on the merits.

The complaint alleged that the action of the city in creating storm sewer district and authorizing construction was arbitrary, capricious, and illegal: that question of benefit to property holders was disregarded: that property holders were deprived of property without due process: that these property holders could not be benefited by the sewer. The complaint was sufficient to entitle property owners to injunction against construction of sewer the Supreme Court ruled, and the court below erred in sustaining motions to dismiss.

The Court followed *Ross v. City and County of Denver,*[5] where in a similar proceeding the complaint was held to be good as against a demurrer under the old code procedure. The rule being that on motions to dismiss, all of the allegations of the complaint are conclusively presumed to be true.

(4) *Chamley v. City and County of Denver,* .... Colo. ...., 266 P. 2d 1103.

Plaintiff, Chamley, a publisher of a sports magazine, and several agents solicited subscriptions on the streets. While the details are not recited in the opinion by Judge Bradfield—the sales pitch entailed the use of becoming females under the age of consent, who concentrated their efforts upon the male of the specie and particularly those in the armed services. For soliciting upon the

[5] 89 Colo. 317, 2 P. 2d 241.

streets without a license and because some of the solicitors were females under the age of 21, arrests were made under a city ordinance.

The plaintiff, while contending that the ordinance was unconstitutional, chose the remedy of injunction to restrain enforcement of the ordinance and try the issue.

The Supreme Court held that the trial court properly dismissed the action. The Court pointed out that in an action to restrain the enforcement of an ordinance, it is improper for the Court to pass upon the validity of the ordinance because the complainant has an adequate and complete remedy at law. Further, all questions of the constitutionality or other invalidity of the ordinance may be asserted and determined in the pending law action where plaintiff is on trial.

The Court recognized an exception to this rule, to the effect that injunction could be resorted to if a party had been previously tried under the ordinance and had prevailed—then it would be necessary to protect a party from oppressive and vexatious litigation. But while Chamley had been arrested and tried before, he had been the loser, hence the exception did not apply.

(5) *McDonald v. City of Glenwood Springs,* .... Colo. ...., 267 P. 2d 111.

This is a suit for injunction and declaratory judgment, but mere contemplation to construct a public improvement had matured into a contract to do so in this case. Agreement had been entered into between the City, the County of Garfield, and the State Highway Commission, whereunder the County was to pay one-quarter of the cost of replacing a bridge over the Colorado River *to be constructed wholly within the City.* The City had taken appropriate steps to constitute the city street and the bridge involved, a part of Highway 82. While several previous decisions had disapproved the use of county funds to build bridges within the limits of a town, the Supreme Court pointed out that at the time of those cases there was no statutory provision giving the Board of County Commissioners power to make agreements with a state highway authority for the construction of state highways. In 1921, the Legislature supplied this authority. Further, that while the power expressly conferred was not specifically re-enacted in the 1952 Department of Highways Act, there was no intent shown to divest the Department of that right. Hence, the Court found an implied right to so do. In 1953, the Court observed that the legislature apparently felt such authority to contract with one another was at least implied, as it expressly confirmed and ratified existing contracts between governmental units.

(6) *Champion v. City of Montrose,* 128 Colo. 474, 263 P. 2d 434.

Plaintiffs sought declaratory judgments against defendant, City of Montrose, under Rule 57(b) to have declared invalid certain ordinances, all relating to a local streeet improvement district,

and to restrain future contemplated actions thereunder of defendant city.

Since the creation of the district, seven years before, extensive work had been done through the proceeds of a bond issue of $140,000 —all but $1,000 of which had been repaid, and by property assessments.

It was held that the questions presented here are not within the purview of the Declaratory Judgment Act.

Besides holding that necessary parties to the action were wanting, the Court pointed out that the City had been engaged in activities under those ordinances for seven years and if plaintiffs had, during this period, considered the ordinances invalid, they could have invoked injunction proceedings to enjoin enforcement.

With showing of Colorado precedent, it also ruled that future contemplated acts of the city present no grounds for declaratory judgment action.

ZONING

(1) *DiSalle v. Giggal,* 128 Colo. 208, 261 P. 2d 499.

This was an action for injunction to restrain building operations in a zoned district.

The tract in question was zoned in 1941 by the County Commissioners of Arapahoe County. By such zoning the use of the tract was restricted to five family units. Without building permit, defendant in 1945 commenced construction of nine family units. When the buildings were approximately two-thirds completed the County Zoning authorities halted construction. The defendant thereupon applied for building permits for the work undertaken, promising to reduce the units to five when the war emergency housing situation was over. In 1949, the emergency being over, demand was made for conformance, but was refused.

The important contention advanced by defendant was that the restrictions in the zoning resolution limiting density of population are void. The Court held upon the authority of *Colby v. Board of Adjustment of Denver,*[6] that such limitations, when reasonably applied, are in the proper exercise of the police power. In the instant case, the Court ruled that the regulation of the number of families to a given lot area is of vital importance to the orderly development of a rapidly growing territory adjoining a city, particularly for reasons of sanitation thereof.

The further defenses of laches, estoppel and the one year statute of limitations were rejected under the circumstances present.

(2) *Bohn v. Board of Adjustment of the City and County of Denver,* .... Colo. ...., 271 P. 2d 1051.

Relator applied to the Chief Building Inspector for a permit to construct an addition to his existing motel on eight lots owned by

[6] 81 Colo. 344, 255 P. 443.

him since 1922. The lots were located on Wolff Street just off West Colfax Avenue in Denver. They were zoned Residence "B". Relator failed of permission before the Inspector, Board of Adjustment and District Court.

The sole question prosecuted to the Supreme Court was whether the evidence entitled relator to the relief demanded. No protests or objections to the petition had been made. The Court found nothing in the return of respondents which even remotely suggested that the contemplated use of relator's property would be injurious or detrimental to adjacent properties. It recognized the principle that any regulation or restriction upon the use of property which bears no relation to public safety, health, morals or general welfare, cannot be sustained as a proper exercise of the police power of the municipality. The Court found the surrounding area to be commercial in nature and concluded that the Board's action was arbitrary and directed issuance of the permit.

AGENCY, CONTRACTS, CORPORATIONS AND PARTNERSHIPS

By ERVIN T. LARSON *of the Ordway Bar*

AGENCY

(1) *Gray v. Blake,* 1953-54 C.B.A. Adv. Sh. No. 4.

Action by real estate broker Gray against the defendant Blake for commission in obtaining a purchaser for certain real estate. Trial by jury was in favor of defendant and plaintiff sued out writ of error. Blake and his wife were owners in joint tenancy of ranch property. Blake alone listed the property with Gray in 1949 and again in 1950. In March, 1951, Gray obtained a prospective buyer for the property upon terms which were approved by Blake. A down payment of $1,000 by the purchaser was made by check but the check was never cashed. Abstracts were furnished and examined, after which the purchaser tendered the balance of the purchase price in cash and demanded a deed signed by both Mr. and Mrs. Blake. Mrs. Blake refused to sign, the deal fell through and Gray sued for his commission.

Held: That if the broker Gray knew in advance that Mrs. Blake would not join in the conveyance the broker could not recover a commission. The opinion also indicates that if the broker knew of the existence of the joint tenancy at the time of the listing, it would be incumbent upon him to obtain the wife's consent to the listing as well as the husband's. The case was reversed for failure of the trial court to instruct properly and the cause was remanded for further proceedings.

(2) *Dumont v. Teets as Director of Employment Security,* 1953-54 C.B.A. Adv. Sh. No. 4.

Plaintiff, Dumont Sales Company, a partnership, brought action against Bernard E. Teets as Director of the State Depart-

him since 1922. The lots were located on Wolff Street just off West Colfax Avenue in Denver. They were zoned Residence "B". Relator failed of permission before the Inspector, Board of Adjustment and District Court.

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(2) *Dumont v. Teets as Director of Employment Security,* 1953-54 C.B.A. Adv. Sh. No. 4.

Plaintiff, Dumont Sales Company, a partnership, brought action against Bernard E. Teets as Director of the State Depart-

ment of Employment Security, seeking a declaratory judgment to the effect that certain of their agents were individual contractors and not employees and therefore the company was relieved from making contribution under the Colorado Employment Security Act.

The stipulated facts were that the Dumont Company was engaged in selling maintenance equipment and janitorial supplies and had several agents who had applied for permission to sell the company's products. Some of the agents were assigned certain territories, others had no particular territory. They used their own automobiles and paid all of their own expenses. They remitted the full price for all orders directly to the company and were paid direct commissions by the company. There were no restrictions of any kind as to the amount of time to be devoted to the sale of the company's products by these agents and many of them sold several other lines as well as the Dumont Company products. Also, some of the agents devoted only a small part of their time to selling the Dumont Company's products. The agency agreement was subject to termination by either party at any time and agents were not required to sell any particular amount of the products or to refrain from engaging in other occupations.

The trial court held the agents to be employees and entered judgment in favor of the Department of Employment Security. On writ of error to the Supreme Court, the Court held that since the word "employee" is not defined in the Colorado Employment Security Act it retained its ordinary and customary meaning, the true test being the right of control retained by the employer. In the instant case, no particular services were required and no time limit fixed and therefore the agents were definitely classified as individual contractors. The ruling of the trial court was therefore reversed.

(3) *Lambert v. Haskins*, 1953-54 C.B.A. Adv. Sh. No. 5.

This is probably the most important case in this category during the present year, since it is one of first impression in Colorado.

The defendant Lambert by written listing employed the plaintiff Haskins as sole and exclusive agent to sell or exchange his farm at an agreed price and on an agreed commission. The agreement was to run for two months from date and thereafter until thirty days' written notice of termination was given. The plaintiff contacted some prospective purchasers but never found a buyer, and approximately a month after the date of the listing the defendant himself sold the property at a lower price than that listed with the plaintiff. The plaintiff brought this action for the commision provided in the listing. The trial court gave judgment for the commission.

The Supreme Court held that the trial court erred in giving plaintiff judgment for his commission, since he was entitled to such a commission only in case he procured a purchaser at the agreed price. The sale by the owner does not violate a contract of

exclusive agency. Such a right to sell is an implied condition of every agency contract and will prevail unless it is expressly negatived. The only effect of an exclusive agency contract is to forbid the owner from placing the property in the hands of another agent. The owner always has the right to sell the property himself without violating his obligation to the agent. Judgment was reversed and cause remanded to enter judgment of dismissal.

(4) *Gibbons and Reed Co. and Boyle Bros. Drilling Co. v. Howard,* 1953-54 C.B.A. Adv. Sh. No. 12.

This is a case involving "scope of employment" in the determination of liability in a tort action. Plaintiffs, Mr. and Mrs. Howard, sued the defendant companies for personal injuries and property damage resulting from a collision between plaintiffs' car and a truck owned by the defendant companies.

The undisputed facts were that the truck was owned by the defendant companies and it had been the custom of the companies to permit certain responsible employees to use the truck for personal purposes. In the instant case, an employee obtained permission to use the companies' truck for the purpose of moving his family and belongings from Loveland to Climax. During the moving trip, the accident occurred and the plaintiffs brought suit against the defendant companies. The trial court entered judgment for the plaintiffs and the defendant companies sued out a writ of error.

The Supreme Court held that there is a distinction between acts done "while in employment" and acts done "within the scope of employment". In the instant case the only evidence of the driver's acting within the scope of his employment was the practice by the defendant companies in permitting their employees to make occasional use of this particular truck for individual and personal purposes. It was the burden of the plaintiffs to establish that acts occurred within the scope of employment and there was no evidence whatsoever to establish this. The use of the defendants' truck for the employee's personal convenience did not expose the defendants to liabilty. Case was reversed and cause remanded with instructions to dismiss the complaint.

CONTRACTS

(1) *Smith v. Whitlow,* 1953-54 C.B.A. Adv. Sh. No. 11.

Plaintiff, Whitlow, as assignee of a construction contract brought suit against the defendant Smith for the balance due under the contract. Smith defended on the ground that he had actually signed the contract as president and agent of a corporation which had become defunct prior to the bringing of the action. Smith asked that the contract be reformed to substitute the corporation as the real party in interest. There was no dispute as to the amount due.

Evidence showed that plaintiff's assignor had originally prepared the contract and that Smith had refused to sign it in its original form and had taken it to his attorney for revision. A contract was finally signed in the attorney's office but Smith was the

only party mentioned and the corporation which he allegedly represented was never referred to in the contract.

The trial court entered final judgment in favor of the plaintiff against the defendant Smith. Smith then filed motion for new trial and upon its being denied took the case to the Supreme Court.

It was held that even if all of the evidence presented by Smith in support of his contention that he signed the contract solely as agent for the corporation were accepted as true, it would still constitute only a unilateral mistake and that a unilateral mistake does not justify reformation of a contract. The Court further stated that even in the case of the reformation of a contract on the grounds of a mutual mistake the evidence must be clear, unequivocal and undisputable. Judgment in favor of the original plaintiff was affirmed.

(2) *Whitechurch v. Dunlap,* 1953-54 C.B.A. Adv. Sh. No. 14.

This is an action on a sales agreement for a used truck and involves alleged representations made by the seller concerning the running condition of the truck. There was also an issue as to a payment to a finance company which was supposed to have been made by the seller but had to be paid by the buyer before he obtained title to the truck.

The buyer was required to make substantial repairs to the truck after he acquired it and the trial court entered judgment for $689 in favor of plaintiff, said sum consisting of the unpaid installment to the finance company plus a part of the repair bill. In the Supreme Court it was held that there was no evidence to justify the finding of fraudulent representations by the seller and that in fact the evidence seemed to show that the buyer relied upon his own judgment in accepting the truck rather than upon what the seller told him. The judgment was reduced to the sum of $124 which was the amount of the unpaid installment to the finance company, and affirmed as to that amount.

(3) *Carleno Coal Sales, Inc. v. Ramsay Coal Company,* 1953-54 C.B.A. Adv. Sh. No. 14.

This case involves the right to terminate a contract for failure of performance by one party. The plaintiff and the defendant had entered into a written contract whereby the plaintiff was granted the exclusive distribution for all coal produced by the defendant's mines, excepting a reserved right to sell to certain railroad companies. The contract was entered into in 1944 and carried a term of five years with a renewal option for an additional five years. Three years after the contract date the defendant served a notice of immediate termination which merely stated that the plaintiff had failed and refused to execute the provisions of the agreement. The written contract provided that the innocent party *may* give sixty-day written notice of default and then terminate.

After serving the notice of immediate termination on the plaintiff the defendant ceased to deliver coal to the plaintiff and delivered the same to other purchasers. Plaintiff brought suit for

damages. The trial court held that the termination by the defendant was effective and judgment was entered in favor of the defendant.

On writ of error to the Supreme Court it was held that the provision in the written contract for cancellation by sixty days' notice was the only manner in which the contract could be terminated prior to the expiration of its original term. Defendant's contention was that the word "may" in the written contract in connection with the termination clause merely gave each party an additional method of termination and that either party still had the original right to immediate termination upon breach or failure of performance.

The Court held, however, that the word "may" gave each party the right to determine whether a breach was of sufficient consequence for such party to seek termination of the contract, but that if termination was desired it must be accomplished in accordance with the provisions of the written agreement. The judgment of the trial court was reversed and the case remanded for determination of damages, if any, sustained by the plaintiff.

(4) *Mills v. Sharpe,* 1953-54 C.B.A. Adv. Sh. No. 16.

This is a suit on the basis of *quantum meruit* for labor performed in the construction of four irrigation dams brought by plaintiff, Sharpe, against defendant, Mills. Evidence showed that initial negotiations for the dams had been between the plaintiff and one Watkins but that dams were built on land owned by the defendant or leased and used by her. The dams were constructed under the directions of the defendant who changed some plans for the dams and on occasion halted the work on one of the dams. The trial court gave judgment for the plaintiff in the amount prayed for and the defendant appealed, the principal point of the appeal being that the defendant was not a party to the contract, that there was no privity of contract between plaintiff and defendant, no consideration and no mutuality of contract.

The Supreme Court held that if the plaintiff did the work for the defendant's benefit and with her knowledge he is entitled to recover reasonable compensation therefor. There being little question that the dams were constructed for the benefit of the defendant and that she had knowledge thereof, the judgment was affirmed.

(5) *Barday v. Steinbaugh,* 1953-54 C.B.A. Adv. Sh. No. 16.

Suit on a promissory note. Defendants executed a promissory note for $18,000.00 payable to the plaintiff in monthly installments of $150 each, the first payment to become due July 1, 1951. The note carried no interest but provided for default interest and also contained an acceleration clause in the event of default.

There appeared to be no dispute as to the facts, which were as follows: Defendant made payment of each installment through December of 1951 and mailed a check for the January 1952 pay-

ment, which check was received by the plaintiff and lost in the mails when she sent the same for deposit. Defendants continued making the monthly payments thereafter but did not make another payment of the January 1952 installment although plaintiff requested the same on numerous occasions. In October 17, 1952, plaintiff gave notice of her election to declare the full amount due and payable, coupled with a demand for default interest, all based on the January payment which had been lost. After delivery of the notice the plaintiff accepted two more monthly installments and then returned subsequent tendered installments. The trial court granted defendant's motion for summary judgment on the ground that the acceptance of payments after the notice of acceleration constituted a waiver of the acceleration right.

In the Supreme Court, the trial court was upheld, the Supreme Court holding that the right to accelerate is an optional right in the payee and may be waived. In the instant case waiver was made complete by the acceptance of regular installment payments after the acceleration notice had been given. Judgment was affirmed.

(6) *Constitution Life Insurance Co. v. Rogerson,* 1953-54 C.B.A. Adv. Sh. No. 17.

This case involves the interpretation of certain rules of contracts with respect to a written application for a life insurance policy and the life insurance policy subsequently issued on such application. The plaintiffs, Mr. and Mrs. Rogerson, made application for a $20,000 life insurance policy on each, the purpose being to obtain certain benefits in connection with estate taxes. Payment of the first year's premium accompanied the application for each policy and the application contained the usual provision that the application and policy issued thereon constituted the entire agreement between the parties and that no outside statements or parol agreement were of any force or effect. When the policies were received by the plaintiffs they refused to accept the same and sued for the amount of the premiums plus interest.

The basis of the plaintiffs' claim was that the policies were at variance with the application in each case and therefore the policy constituted a counter offer by the insurance company which the plaintiffs could accept or reject. The first annual premium as stated in the application for one policy was $1,767.60, whereas the policy issued thereon called for an annual premium of $1,808.60, an increase of $41.00. This was one of the grounds of the allegation of variance, the others being that the application called for "commercial whole life" policies and that the statement of absolute ownership in each policy was not called for by the respective applications. The trial court held that the policies issued by the company were at variance with the applications and rendered judgment in favor of the plaintiffs for the full amount of the premiums plus interest.

The Supreme Court held that the change in the amount of premium on the one policy constituted a variance from the applica-

tion and therefore the policy was merely a counter offer which could be rejected or accepted by the applicant. The change in policies from a "commercial whole life" to a "whole life" policy was not considered a variance since no evidence was introduced to show any difference between the two policies. The absolute ownership clause in the policy was likewise construed not to be at variance with the application, since the formal application in each case had attached thereto a written statement providing for such absolute ownership. Accordingly, the judgment of the trial court was affirmed as to the policy where increase in premium occurred and was reversed with respect to the other policy.

(7) *Pioneer Mutual Compensation Company v. Vernon Casualty Insurance Company and Roxie Johns.* 1953-54 C.B.A. Adv. Sh. No. 18.

Suit by Johns against both insurance companies to recover under collision policies in both companies on a certain tractor and trailer which had been damaged. Johns owned two similar tractor-trailer outfits. The one involved had been insured in the Vernon Company first and when Johns applied for a policy on the second trailer outfit with the Pioneer Company an error in description was made so that the Pioneer policy covered the same outfit already insured by the Vernon Company. The same agent handled both policies. The Pioneer policy was delivered to the agent on January 10, 1952 at which time he noticed the mistake in the description of the trailer outfit and notified the company immediately. The policy however was delivered to Johns and the accident occurred eight days later. After the accident an agent for Pioneer contacted Johns and agreed to pay the entire loss, authorizing repairs to be made on the trailer. Shortly thereafter the tractor-trailer was repaired and Johns disposed of it. After Pioneer agreed to the settlement they cancelled the policy as of January 28, 1952 and Johns paid the premium to that time. Pioneer then refused to pay the loss. The trial court gave judgment to Johns against both insurance companies and Pioneer appealed.

Pioneer's contention was that the policy involved covered the tractor-trailer outfit by mistake and should be reformed to describe the vehicle intended to be covered. It was held that since the Pioneer Company had received and retained a premium for the period during which the accident occurred and since its agent had authorized settlement under the policy, it had waived any right to reformation. Judgment against the Pioneer Company was affirmed and judgment against the Vernon Company was reversed since no proof of loss or other requirements of the Vernon Company policy had been complied with by Johns.

CORPORATIONS

(1) *Department of Employment Security v. General Cleaners and Dyers.* 1953-54 C.B.A. Adv. Sh. No. 2.

This case does not involve any corporation laws as such but

concerns the state statutes on unemployement security. The General Cleaners and Dyers as plaintiff in the trial court sought judgment for a stipulated amount as refund of contributions paid under protest to the defendant, Department of Employment Security. Plaintiff was a corporation which had purchased a partnership business and the issue was whether the corporation was entitled to continue the contribution rate as determined by its predecessor, the partnership.

The Spreme Court held that the corporation was not entitled to continue the partnership contribution rate since the statutory requirements with respect to the predecessor in business owning at least 50% of the interest in the successor business had not been met. The judgment of the trial court awarding the refund claimed was reversed.

(2) *Arvey Corporation v. Fugate, Director of Revenue of the State of Colorado.* 1953-54 C.B.A. Adv. Sh. No. 16.

This case involves an income tax assessment by the State of Colorado against a foreign corporation. A subsidiary of the Arvey corporation, an Illinois corporation, was engaged in the manufacture of insecticides in several states but had no plants in Colorado. One Julius Hyman had invented the insecticides and was an officer and director of the subsidiary corporation. Differences arose and Hyman resigned and formed a new corporation with authority to do business in Colorado. The Arvey corporation subsequently brought an action in the Denver District Court to obtain an injunction against Hyman and his company to restrict them from manufacturing and selling certain insecticides and for damages from the wrongful use of the Arvey company's trade secrets, etc. The injunction was granted and a judgment in favor of the Arvey company for over a million dollars was entered.

This judgment was affirmed by the Supreme Court and upon its affirmance the Director of Revenue of the State of Colorado asserted his claim for income tax liability against the Illinois corporation. The trial court gave judgment in favor of the Director of Revenue and the Arvey corporation assigned error. It was contended by the Arvey corporation that the judgment against Hyman and Company was compensation for injuries and damages sustained by their wrongful acts and was an intangible having as its situs the domicile of the Arvey corporation and therefore should not be taxable by Colorado.

It was held however that there was no question concerning the source of the income, that the judgment itself was based on profits made by Hyman and Company in Colorado and that an adjudication had already been made that the judgment was for the amount of the profits made by Hyman and Company. Since the real question was the jurisdiction to tax, Colorado's right to levy an income tax on this judgment was undeniable. The trial court's judgment in favor of the Department of Revenue was affirmed.

(3) *Burleson v. Hayutin,* 1953-54 C.B.A. Adv. Sh. No. 17.

This is a case involving the appointment of a receiver for a corporation. Plaintiff Burleson and one Vaughn were originally partners and owners of the Curve Tavern. Two of the defendants were attorneys for these partners and Vaughn subsequently sold his interest to all of the defendants. A corporation was formed and the assets of the partnership were transferred to the corporation, one-half of the stock being issued to the plaintiff Burleson and the other one-half issued to the five defendants.

At the first meeting of the corporation Burleson was elected president and made a director and actively managed the business, receiving a salary of $250 a month. About a year later Burleson was informed that his position as president and his salary were terminated and that one of the defendants would be the new president. The directors authorized payments of salaries and a percentage of the profits to three of the defendants and thereafter Burleson did not receive either salary or dividends from the corporation. Prior to the directors' meeting which ousted Burleson he had given a proxy to vote his stock to one of the defendants, the written proxy providing that it was irrevocable as long as the two lawyer defendants owned any stock in the corporation. Burleson subsequently filed a suit in district court for an accounting, for dissolution of the corporation and for receivership. The trial court refused to appoint a receiver on the grounds that no mismanagement of the corporation business was alleged or shown and that no emergency existed.

Burleson appealed under Rule 111 of the Colorado Rules of Civil Procedure and the Supreme Court held that the circumstances of this particular case were such that a receiver should have been appointed. Two of the defendants were attorneys for the plaintiff at the time they purchased the one-half interest in the business and a very close and delicate relationship existed. When plaintiff, who was the owner of one-half of the stock, received absolutely nothing from the corporation after defendants assumed control the only relief available to him was the appointment of a receiver and an accounting. The order of the trial court denying the appointment of a receiver was reversed.

PARTNERSHIPS

(1) *Silvola v. Rowlett,* 1953-54 C.B.A. Adv. Sh. No. 16.

This was an action by the plaintiff Silvola to recover judgment for services rendered to the McRea Motor Company, the suit being against the defendant Rowlett, one of the partners. McRea and Rowlett formed a limited partnership under the name of McRea Motor Company and had filed a certificate of limited partnership indicating that McRea was the general partner and Rowlett the limited partner. Under the terms of the limited partnership Rowlett contributed certain personal property and cash and was to receive 9/24 of the profits of the partnership.

McRea was the manager of the business and had contracted for the employment of the plaintiff as an accountant to keep the books and records of the partnership. Rowlett acted as foreman in the partnership repair shop for a period of some six or eight months, after which he discontinued his services as foreman and another person was employed by McRea as foreman of the shop. The partnership funds were all in one bank account under the sole and exclusive control of McRea. He made all deposits and was the only person authorized to draw checks on the company account. Since McRea had been discharged in bankruptcy, suit was brought against Rowlett and the trial court sustained Rowlett's claim that he was a limited partner and entered judgment for the defendant.

In the Supreme Court the plaintiff contended that the assumption of duties as foreman of the partnership shop and the fact that Rowlett at time discussed the partnership business with McRea removed him from the status of a limited partner and rendered him liable as a general partner. In affirming the trial court's judgment, however, the Supreme Court held that the services rendered by the defendant did not deprive him of his protection as a limited partner and that the partnership act does not impose a silence on a limited partner to voice his opinion and suggestions concerning the business.

(2) *Kincaid v. Miller,* 1953-54 C.B.A. Adv. Sh. No. 16.

Action in the trial court by the plaintiff Miller to recover one-half of certain profits alleged to have been received and retained by the defendant Kincaid from a joint venture of Miller and Kincaid in certain oil leases and properties. The trial court found in favor of the plaintiff and defendant appealed to the Supreme Court by way of writ of error.

The evidence disclosed that plaintiff and defendant jointly purchased certain oil leases, taking the leases in the name of a third party. Certain leases and portions of leases were later sold and the proceeds from the sale were divided equally between the parties. Subsequently the defendant Kincaid repurchased various interests which had been sold and then resold them at large profits, which profits were retained entirely by the defendant. The defendant admitted the original joint venture in the leases but claimed that after such leases had once been sold or disposed of the joint venture relationship terminated and his subsequent acquisition of the leases was an individual venture in which the plaintiff had no interest and should not share in the profits.

The testimony contained several admissions by the defendant in support of plaintiff's claim of joint ownership and the Supreme Court found that the joint ownership existed throughout the entire transactions. It was held that in a joint venture one party cannot exclude his co-owner from a rightful interest in joint property by purchasing it himself and must account to his associate for any interest in the joint venture property which he acquires for his individual benefit. The judgment of the trial court was affirmed.

INDEX TO VOLUME XXXI

AUTHOR INDEX

SUBJECT INDEX